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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RALPH GARCIA, Defendant and Appellant.	E045614 (Super.Ct.No. RIF133026) OPINION

APPEAL from the Superior Court of Riverside County. Paul E. Zellerbach, Judge. Affirmed.

Thomas Owen, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Barry Carlton and Elizabeth A. Hartwig, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant, Ralph Garcia, of murder (Pen. Code, § 187, subd. (a)),[1] during which he discharged a firearm proximately causing death (§ 12022.53, subd. (d)), attempted murder (§§ 664, 187, subd. (a)), during which he discharged a firearm proximately causing great bodily injury, and possession of a firearm by an ex-felon (§ 12021, subd. (a)(1)). He was sentenced to prison for two consecutive terms of 25 years to life, plus 15 years to life, plus 7 years. He appeals contending the evidence was insufficient to support his conviction of attempted murder, the jury was misinstructed and sentencing error occurred. We reject his contentions and affirm.

FACTS[2]

The murder victim and the attempted murder victim were friends and neighbors at an apartment complex; defendant stayed at the complex during weekends in his girlfriend's apartment. The murder victim was 17 years old. The attempted murder victim was 21 and lived in the apartment below defendant's girlfriend's next door neighbor. Defendant was 25 and weighed 240 pounds. He testified at trial that he was bigger than the murder victim and did not fear him physically.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] Most criminal cases are appealed. Once appealed, it is one of the jobs of this court to reconstruct what evidence the jury received, particularly in a case like this, where insufficiency of the evidence is alleged on appeal. It is very difficult to do this accurately when witnesses are permitted by trial counsel to point to certain places in exhibits without the record making clear to what they are referring. For example, this happened over and over in this case.

Around 6:30 p.m. on October 21, 2006, defendant and the murder victim, who was the best friend of defendant's girlfriend's nephew, met each other on a staircase leading to the murder victim's apartment, which was some distance from defendant's girlfriend's apartment. About a half hour before the crimes, defendant had been seen at various places around the complex and near the murder victim's apartment around the time of the confrontation, appearing to be looking for someone or something, which was unusual, as it was his custom to travel only to his girlfriend's apartment and to escort a child living with her to school, neither of which required him to go near the murder victim's apartment. Earlier that day, defendant had asked the sister of the murder victim's best friend where the murder victim played soccer, but she did not know. Defendant told her that he did not like the murder victim, that he was upset with him and would do something to him, which she understood to mean that defendant would beat him up. She had been told by her brother that the murder victim owed defendant's girlfriend a small amount of money, and defendant was upset about this. When defendant and the murder victim met on the staircase leading to the latter's apartment, defendant blocked the murder victim from going to his apartment by placing his hands on the railing on either side of the murder victim. Defendant held onto the railing and pushed the murder victim with his stomach, causing the murder victim to fall to a sitting position on the staircase. Thereafter, the two exchanged insults and defendant appeared to be more angry at the murder victim than vice-versa. The murder victim was able to slip away from defendant

and he ran into his apartment. Defendant returned to his girlfriend's apartment in an aggressive manner, using obscenities as he went.

Minutes after this, the attempted murder victim was on his way to his apartment to pick up a gift to take to a party he was going to attend when he encountered the murder victim on the walkway near the former's apartment. The attempted murder victim invited the murder victim to attend the party with him and the latter went to his apartment, changed his clothes and met the attempted murder victim outside the latter's apartment. The murder victim appeared to be normal, not upset. The two walked to the parking lot, on the way seeing defendant sitting on the balcony of his apartment, and got into the attempted murder victim's vehicle. As they were about to leave, the murder victim's father and uncle encountered them in the parking lot and the murder victim told the older men that defendant had pushed him earlier, but he did not know why. The attempted murder victim asked the murder victim if the latter owed defendant money, which the attempted murder victim could loan the murder victim to repay defendant. The attempted murder victim came up with the idea of returning to the apartment complex and talking to defendant to resolve the matter. He intended to tell defendant that if the murder victim owed defendant money, defendant would be paid. The victims went down a short staircase and onto the walkway between it and below the balcony of defendant's girlfriend's apartment. The murder victim, in a non-threatening tone, told and motioned for defendant to come down the long staircase leading from the girlfriend's apartment to the walkway. Defendant reacted angrily, stood up and went into the living room of his

girlfriend's apartment. He retrieved from his girlfriend's bedroom the loaded semi-automatic he kept there. The attempted murder victim, from his position on the walkway, heard the sound of a gun being "racked" or loaded in the living room of the defendant's girlfriend's apartment. The victims remained where they were on the walkway below the balcony, between it and the short staircase. Defendant suddenly came out of his girlfriend's apartment, moved quickly down the long staircase and towards the victims, then fired six .22-caliber bullets when he got onto the walkway, short of where the victims were standing.[3] As defendant was shooting, the unarmed victims ran away from him, and ascended the short staircase.

There were five steps up from the walkway to the top landing of the short staircase. There were 23 feet, 11 inches between the location on the walkway next to the six expended casings and the first step of the short staircase. After the sixth bullet had been fired, the murder victim lay midway up the short staircase with an entrance wound to the back of his head near the top and another to the back of his right thigh. The attempted murder victim had been hit in the back of his right leg as he reached the top landing of the short staircase. Another bullet had gone into the wrought iron railing near where the murder victim had collapsed. Another bullet strike was on the wrought iron

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[3] Defendant incorrectly states that he "descended the [long] stair[case] firing" citing page 176 of the reporter's transcript. This portion of the transcript contains the attempted murder victim's testimony stating that defendant fired from the walkway, not the staircase. Moreover, the location of the bullet casings, as discussed above, supported his testimony. In short, there was no evidence that defendant fired from the long staircase.

fence a little over 20 feet from the middle of the short staircase and in almost a straight line from the bullets that hit the victims and the short staircase railing. A second strike mark was a little over four feet beyond the first strike mark, again, in approximately a straight line with the others. A detective testified that there was a low probability that someone without training in shooting could hit something without aiming the gun. Defendant had no such training and had shot a gun only one or two times, once, into the air, on New Year's Eve. The detective also testified that the gun defendant used has recoil, such that in order to continue to fire after the first shot and hit the target, the shooter would have had to re-aim, even if the shooter was a large person. He further opined that there was no reasonable likelihood that the bullets fired during these crimes could have hit where they did without the shooter aiming. He added that it is difficult to hit a moving target from 20 feet or more away.

After the shootings, defendant ran down another set of stairs between where he was when he had fired the shots and the short staircase. He threw his gun in a dumpster (it was never recovered). He used someone else's cell phone to call his brother and have him pick him up and he hid out from law enforcement for two weeks before his family finally prevailed upon him to turn himself in.

Defendant claimed at trial that he had not been looking for the murder victim before their confrontation on the staircase near the latter's apartment, but for his girlfriend's great nephew. He denied harboring any animosity towards the murder victim and claimed he was bewildered and was made to be fearful by the latter's verbal

aggression towards him both before and after the confrontation on the staircase. Defendant claimed that at the conclusion of this incident, the murder victim put his hand on his pocket, suggesting to defendant that he had a weapon, which further put defendant in fear. He claimed that fear and his consequent desire to get away from the victims motivated him to get his gun and shoot the victims after the murder victim renewed his verbal aggression towards defendant as the latter sat on his balcony and the attempted murder victim added to this by putting his hand in his pocket, again signifying to defendant, that he, too, presented a danger. In addition, defendant claimed that as he descended the long staircase from his girlfriend's apartment to the walkway where the victims were, he observed both of them speaking, but not to each other, so he feared there were others present who also presented a danger to him. However, he conceded that his fear of the victims was not justifiable. Still, he claimed that he was not looking at the victims, but fired without aiming, in their direction. At trial, his attorney urged the jury to convict defendant of voluntary manslaughter and attempted voluntary manslaughter on the theory of unreasonable self defense.

The jury was shown a VHS and DVD of surveillance footage which had captured the crimes.

Other facts will be disclosed in connection with our discussion of the sufficiency of the evidence of intent.

1. *Insufficient Evidence of Intent for Attempted Murder*

Defendant contends there was insufficient evidence he intended to kill the attempted murder victim because he had not had a prior confrontation with him, like he had with the murder victim. Although defendant goes on to correctly recite the facts that both victims approached below his girlfriend's apartment together and defendant saw them as he sat on the balcony and the murder victim told him to come here, he fails to grasp the significance of these facts in terms of his intent. They demonstrate that defendant was aware that the attempted murder victim was present with the murder victim and when he fired six shots. The attempted murder victim testified that he and the murder victim were on the walkway when the latter called out to defendant, who was on his girlfriend's balcony, to come down. They remained there even after hearing the sound of defendant "racking" or loading his gun inside his girlfriend's apartment. According to the attempted murder victim, he (and the murder victim) did not move from that spot on the walkway as he heard the first shots being fired.[4] During the shooting, he went up the short staircase and was hit in the right leg when he got to the top. Defendant continued to fire after the attempted murder victim had been shot. The gun defendant

[4] However, the attempted murder victim also testified that he told a police officer after the crimes that he had gone up the short staircase after hearing the noise. As stated in the facts, despite the attempted murder victim's failure to remember what he and the murder victim did between the time defendant came down the long staircase, and they were still standing on the walkway where they had been, and them reaching and mounting the short staircase, both victims had to have traversed the distance. Additionally, defendant conceded that both victims were running from him when he shot them.

was using required him to pull the trigger each time he fired. As already discussed in detail above, there was also evidence that, despite defendant's claims otherwise, he had to have been aiming when he fired or he would not have hit both victims with half of the bullets he fired and all the shots he fired would not have ended up in a line towards the short staircase. Defendant admitted knowing that firing up the short staircase at people was a dangerous act and anyone within the zone of where he was shooting would be in danger. Defendant, himself, testified that the attempted murder victim had his hand in his pocket as he and the murder victim stood on the walkway while defendant was on his girlfriend's balcony and this made defendant fear that the attempted murder victim had a weapon. When defendant testified about the fear he had, he said that it was directed at both victims and he fired the gun to scare both of them away so he could escape. He also testified that when he came down the long staircase from his girlfriend's apartment, he saw the attempted murder victim talking to someone other than the murder victim and was afraid there were other people there as well to do him harm. He further admitted then he then started shooting "towards the direction" of both victims, that he "fired towards them" and that it was possible that he "shot towards [the murder victim] and [the attempted murder victim]." He said he believed they were there to do him harm. He admitted that the videotape showed that the murder victim, who was on the short staircase, was hit and fell first, then the attempted murder victim was struck when the latter reached the top of the short staircase. He admitted that he continued to fire after the murder victim had been hit and collapsed in the middle of the short staircase. He

acknowledged that immediately afterward, he knew he had "just shot at somebody " and he feared that "*they* were going to start shooting." From these facts, the jury could reasonably conclude that defendant was attempting to hit the attempted murder victim with one or more bullets, implying that he intended to kill him.

Contrary to defendant's assertion, the fact that the jury rejected defendant's claim of imperfect self defense did not necessitate it disbelieving all of defendant's testimony, as described above. The jury could have well believed defendant's statements that he knew he was shooting at the victims, and still disbelieved his claim that he was acting out of fear of them. The fact that defendant managed to hit the attempted murder victim in the leg, rather than in the head, like the murder victim, just meant that he was not all that good a shot (understandable, given his claimed lack of experience with firearms), not that he did not intend to kill the attempted murder victim.

Defendant also contends that there was insufficient evidence to support the alternate theory of attempted murder that he intended to kill both the murder victim and someone within the kill zone. By singling out a comment the prosecutor made during argument, and ignoring what else he said, defendant begins with the premise that the jury could have convicted him of attempted murder based on this theory merely if the victim of that crime was near the murder victim and nothing more.[5] He ignores the requirement

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[5] Defendant points to the argument of the prosecutor on this theory, thusly, "There are three charges for you to consider; [Defendant] murdering [the murder victim], [defendant] attempting to kill [the attempted murder victim], either because he wanted to kill him, period, or because [the attempted murder victim] was near [the murder victim],

[footnote continued on next page]

that he had to intend both to kill the murder victim and to kill someone within the kill zone in arguing that there was insufficient evidence that "[his] method of assault on [the murder victim] was so destructive the jury could reasonably find [he] had the concurrent intent to kill [the attempted murder victim]."

Defendant correctly points out that the kill zone theory applies when an assailant acts to ensure the death of his intended target and the jury reasonably infers from the nature of his acts that he has an intent to also kill others. (*People v. Bland* (2002) 28 Cal.4th 313, 330 (*Bland*).) Despite defendant's assertions to the contrary, as stated

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[footnote continued from previous page]
and [defendant] in felony possession of a handgun." This statement was the first one out of the prosecutor's mouth and it was a brief summary of the charges against defendant. In this statement, the prosecutor omitted from the second theory of defendant's guilt of attempted murder the requirement made clear in the jury instructions that defendant had to intend both to kill the murder victim and someone within the kill zone, but if the prosecutor's "short hand" references to the charges was a misstatement of the law to which defendant wanted to object, he should have. He did not. Later, the prosecutor correctly stated the requirements of this theory of attempted murder thusly,"[T]he defendant had the specific intent to kill. . . . The 'either' [in the instruction refers to] specifically intended to kill [the attempted murder victim]. . . . Or the intent to kill [the murder victim] and anyone in the kill zone of [the murder victim]. [The murder victim], and anyone with you, okay? [¶] . . . [¶] So what do you have to determine for [the attempted murder charge]? Did [defendant] intend to also kill [the attempted murder victim]? Did he intend to kill [the murder victim] and anyone within the zone, the kill zone, of [the murder victim]?" Still later, the prosecutor said, "[Defendant] . . . went downstairs, aimed and fired in order to kill [the murder victim]. In order to kill anyone near [the murder victim]." Although defendant contends that by the foregoing the prosecutor was implying that defendant had created a "kill zone" simply by firing a gun at the murder victim, and the attempted murder victim's presence near the murder victim was the legal equivalent of the intent to kill, he was merely saying that the jury could imply the intent to kill the attempted murder victim based on defendant's actions. Given defendant's concession on the stand that he knew anyone in the zone where he fired was in danger, and the prosecutor's argument that defendant aimed when he shot, nothing else needed to be said.

before, there was evidence he aimed at both of the victims. The short staircase was four feet wide and, as stated before, only five steps long. The victims were within a few feet of each other when they were hit. Defendant hit the victims with half of the shots he fired, and hit the short staircase railing near the murder victim with another. The remaining two shots hit within about 15 feet from where the attempted murder victim was when he was hit and within the same line of fire. Defendant fired from about 23 feet away. Defendant, himself, conceded that where the victims were hit and the bullet strikes occurred was within a straight line towards the short staircase and the three shots that did not hit the victims hit nearby them. This constituted sufficient evidence to support a finding that defendant intended to kill anyone within the kill zone of the murder victim.

2. *Jury Instruction*

Defendant contends that the kill zone instruction did not fit the facts in this case. We disagree for the very reasons defendant outlined in his briefs that he had no reason to be angry at the attempted murder victim, combined with the facts which we have mentioned which supplied sufficient evidence to support a finding that he intended to kill anyone in the small space into which he fired six shots.[6] As the defendant correctly notes in *Bland*, "'The intent [to kill the attempted murder victim] is concurrent . . . when the nature and scope of the attack, while directed at the primary victim, are such that we

[6] Although defendant continually mentions during his argument that he fired "low caliber" bullets, as though this had something to do with the zone of danger he, himself, admitted that he created, there was no testimony that the size of the bullets meant that they posed less of a danger to the victims.

can conclude the perpetrator intended to ensure harm to the primary victim by harming everyone else in that victim's vicinity. . . . When the defendant escalated his mode of attack from a single bullet aimed at A's head to a hail of bullets . . . the factfinder can infer that, whether or not the defendant succeeded in killing A, the defendant concurrently intended to kill everyone in A's immediate vicinity to ensure A's death. . . . Where the means employed to commit the crime against a primary victim create a zone of harm around the victim, the factfinder can reasonably infer that the defendant intended that harm to all who are in the anticipated zone.' [Citation.]" (*Id.* at pp. 329, 330.) The kill zone instruction was necessitated by defendant's testimony that he kept his head down during the shooting and therefore did not see either of the victims, that he did not aim when he shot, that he did not see the murder victim fall after being hit despite acknowledging that the video showed the latter was hit and fell before the attempted murder victim was hit, and his acknowledgement that anyone in the zone where he was firing was in danger.[7]

Defendant repeats the assertion he made in connection with his argument that the evidence was insufficient to support a finding of attempted murder under the kill zone theory saying, "The 'kill zone' . . . instruction . . . permitted the jury to find [defendant]

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[7] We find remarkable defendant's assertion that "there was no evidence presented that the bullets were fired anywhere but in the direction of the [murder] victim." However, as stated before, defendant, himself, testified that he fired towards both of the victims and where he hit them and the short staircase railing and the wrought iron fence were all in a line.

guilty of attempt[ed] . . . murder . . . simply based on where [the attempted murder victim] was located[.]" We have already rejected this contention. The jury had to find that defendant intended to kill the murder victim and because he fired into a limited space that he knew contained the attempted murder victim, who was in close proximity to the murder victim, the jury could infer that defendant intended to kill the attempted murder victim.

3. *Consecutive Terms*

The trial court imposed consecutive terms for the murder and attempted murder, finding that there were two separate victims, defendant was on probation or parole at the time of the crimes, his prior performance on probation or parole was unsatisfactory, he used a weapon, the crimes involved a high degree of violence and great bodily injury and the victims were particularly vulnerable, in that they were unarmed and running from defendant at the time he shot them.

Defendant here contends that because some of the factors relied upon by the trial court were either not admitted by him or were not found by the jury beyond a reasonable doubt, we must vacate the sentence and remand the case for resentencing. Defendant concedes that the California Supreme Court has held that such findings are unnecessary (*People v. Black* (2007) 41 Cal.4th 799, 821; *People v. Sandoval* (2007) 41 Cal.4th 825) and that we are bound by these decisions. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Moreover, the jury necessarily found that there were two victims, that defendant used a firearm in both crimes and that he caused death to the

murder victim and great bodily injury to the attempted murder victim. Even if we were to ignore the holdings in *Black* and *Sandoval*, we are not convinced that the sentencing court would not have run the terms consecutively had it not relied on those factors not necessarily found by the jury.

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P.J.

We concur:

HOLLENHORST
J.

McKINSTER
J.